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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-164

PASADENA CITY BOARD OF EDUCATION, et al. . . .,
Petitioners,

vs.

NANCY ANNE SPANGLER, et al. . . .,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Western Regional Office, National Association for the Advancement of Colored People, Amicus Curiae; Brief of Pasadena Branch of the National Association for the Advancement of Colored People, Amicus Curiae; Brief of Pasadena Federation of Teachers (American Federation of Teachers Local 1050), Amicus Curiae; Brief of American Friends Service Committee of Pasadena, Amicus Curiae; and Brief of Pasadena/Foothill Branch of the Greater Los Angeles Urban League, Amicus Curiae.

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INTEREST OF AMICI CURIAE[1]

The Amicus Curiae, Western Regional Office, National Association for the Advancement of Colored People, is Region I of seven (7) regional offices which have been

[1]Letters from counsel for the parties to the action, which consent to the filing of the Brief for Amici Curiae, have been filed with the Clerk of the Court pursuant to U. S. Sup. Ct. Rule 42(2).

established for administrative purposes. The Western Regional Office has administrative control and supervision of nine (9) western states, which includes ninety-three (93) branches with a total membership of approximately 19,000 persons.

The National Association for the Advancement of Colored People (NAACP) was organized over 70 years ago because some Americans denied others basic rights and dignity. Blacks and Whites, who believed in the dignity of the individual came together to pursue that dream. The NAACP continues to pursue a steady course to achieve Dignity and Equality through the courts, the legislatures, education, direct action, voter education and registration, community organization and economic development.

Because of those commitments, the Pasadena case represents one of a series of challenges in the quest to achieve equal educational opportunities for all American children. Since the initial Order to desegregate the Pasadena Unified School District (District), in 1970, the Western Regional Office has observed the increasingly resistant tactics of some elements within the community to the plan for desegregation. The Petition for the Writ of Certiorari represents one of the last of those efforts, it is hoped.

The Pasadena Plan for Desegregation (Pasadena Plan) can be viewed as a model of a comprehensive design to totally eliminate the vestiges of dual school systems and racial discrimination in education. For that reason, the Pasadena Plan must survive.

The Amicus Curiae, Pasadena Branch of the National Association of Colored People has a membership of approximately 800 persons, who are active in all areas of the Pasadena community. This latest appeal represents another effort to discredit and ignore the mandates of the Pasadena Plan and the Decrees and Orders of Judge Manuel Real. The Pasadena City Board of Education (Board) has attempted, through its policies, to frustrate the judicial mandates of Judge Real and to attempt a

resegregation of the schools. The stress, by the Board, on neighborhood schools and freedom of choice as to attendance, is an indication of those attempts.

The Amicus Curiae, Pasadena Federation of Teachers, Local 1050, an affiliate of the American Federation of Teachers, has been an interested party in the Pasadena case since 1968. Membership numbers 250, who are certified, professional teachers in the Pasadena schools. Their involvement ranges from kindergarten through the twelfth (12) grade. Since 1973, when the Board underwent a transformation with the addition of four members who had campaigned against the Pasadena Plan, the organization has continuously expressed a support of Judge Real's Order to Desegregate with the Pasadena Plan. A resolution, to that effect, was submitted to the Board. Positive changes have been observed throughout the school system, not only in academics but in less measurable areas such as attitudes, etc. Consequently, the organization supports all efforts that will continue to provide quality education, to all students, in a totally integrated school system.

The Amicus Curiae, American Friends Service Committee of Pasadena (Friends) is the Pacific Southwest Regional Office for an agency of the Religious Society of Friends (Quakers). The purpose of the organization is to put into practice the tenets of the Quaker faith. The Friends have been in continuous operation for 57 years and has a present full-time staff of more than 500, under a 55-man governing board. All of the work is non-violent and depends upon example and persuasion for its effect in such areas as the relief of war suffering, the furtherance of social justice and individual liberty, and helping to lay the foundations for peace in the world and brotherhood among all.

The Pasadena case is indicative of the concerns of the Friends with public education in the United States. For many years, the organization has worked to encourage public school systems in the United States to be respon-

sive to the needs of all of the nation's youth. The problems which have attended the Pasadena Plan since 1970 represent an integral part of problems on a larger scale with desegregation efforts in the public school system. Therefore, the Friends want to express their concern for the problems which are impeding the provision of quality education to all the children of Pasadena.

The Amicus Curiae, Pasadena/Foothill Branch of the Greater Los Angeles Urban League, with a membership of 150 persons, is dedicated to the improvement of the quality of living for Black people. Total integration of the public school system is an essential ingredient and prerequisite to the provision of equal educational opportunities in the public schools. The organization has consistently supported the Pasadena Plan, and has joined with other organizations and individuals in resisting all attempts to abolish the Pasadena Plan. The present members of the Board have indicated through actions that they have a lack of commitment to the overall purpose of integration of the Pasadena schools. The Board has consistently campaigned throughout the community for a return to the freedom of choice neighborhood plan, which this organization is aware, from prior experience before 1970, is synonymous with segregated schools.

STATEMENT

The Pasadena Plan, as approved by the District Court for the Central District of California in January 1970, represents a comprehensive effort to dismantle a dual school system that had been adjudged representative of de jure segregation. Not only was the plan comprehensive in its scope, but it had the intent of totally desegregating the system at one time with a massive reassignment of students so that no school had a majority of minority students. The plan dealt with attendance zones, assignment of students, intergroup assignments, faculty, staff, administrators, selection of construction sites, etc.—the whole range of school administration.

Immediately after the Pasadena Plan was ordered to be implemented, certain elements within the Pasadena community began a campaign to defeat the purposes of the plan and to maintain the neighborhood school system. The efforts of those elements came to fruition when four of the five members on the Board were replaced by individuals who had actively campaigned for the elimination or modification of the Pasadena Plan. Since the change in the composition of the Board, the Board has engaged in a series of dilatory tactics, which appear to have the primary purpose of frustrating the total implementation of the Pasadena Plan. Other tactics have led the Board into a position of a finding of contempt of the District Court. The most pervasive and dilatory tactic, has been the persistent effort to obtain a legal reversal of the Decree which ordered the implementation of the Pasadena Plan. The Petition for the Writ of Certiorari to the Ninth Circuit of the United States of America, represents the latest of those efforts.

In spite of extensive findings of de jure segregation in the District Court, the Board persists in a posture of innocence. At this time, it is alleging there were no affirmative acts or policy to operate a segregated school system or to frustrate the intent of the Pasadena Plan. The original decrees of the District Court, which found de jure segregation and which ordered desegregation were never appealed. The Circuit Court has affirmed all findings and judgments of the District Court on those issues which have been appealed to that court; and those affirmations were based on narrow grounds which did not go to the initial findings of de jure segregation. However, the Board is now challenging the merits of the original decrees and the validity of those decrees and the Pasadena Plan on constitutional grounds.

A review of the pleadings and briefs, in the lower court proceedings and those filed in this Court, will reveal a mischaracterization of the opinions which have been rendered by the District Court and the Court of Appeals. Through a clever and unusual scrambling of bits and pieces

from various constitutional arguments and opinions of this Court, the petitioners have distorted the realities of this case. The petitioners contend that they have been in compliance with prior Court Orders and that the District has Unitary status, when there are extensive findings to the contrary. The petitioners contend that the District Court has violated constitutional safeguards and abused the discretion of the court, when there are extensive findings to the contrary.

It is the concern of the Amici that if the court grants the relief sought by the petitioners that (1) the Pasadena Plan, a magnificent model for comprehensive and total integration of public schools will be destroyed, and (2) other desegregation efforts throughout the United States will be confused by what would appear to be a departure from prior holdings as to the substantive content of the Fourteenth Amendment as it affects racial segregation in education.

FACTS AND PROCEDURAL HISTORY

This action was originally instituted on August 28, 1968, by certain Pasadena public school children and their parents as a class action against the Board of the District and certain officials thereof, seeking injunctive relief from alleged unconstitutional segregation of its public schools. The United States Government, also endeavoring to eliminate the discrimination, was permitted to intervene as a party plaintiff on December 4, 1968. On January 23, 1970, after a nine-day trial, the District Court entered its Decree, enjoining the Board and the Superintendent of Schools "from discriminating on the basis of race in the operation of the Pasadena Unified School District." *Spangler* v. *Pasadena City Board of Education*, 311 F.Supp. 501, 505 (C.D. Cal.1970). The court required the Board ". . . to prepare and adopt a plan to correct racial imbalance at all levels", and further directed that "[t]he plan shall provide for student assignments in such a manner that, by or before the beginning of the school year that commences in September

of 1970 there shall be no school in the District, elementary or junior high or senior high school, with a majority of any minority students." 311 F.Supp. 501 at 505.[2]

In support of the 1970 Decree from which the appellants now seek relief, the District Court found that the Board had adopted a neighborhood school policy and a policy against forced cross-town busing which resulted "in racial imbalance and increasing racial imbalance." *Id.* at 506. Among the facts supporting the court's conclusion that the Board's policy violated the Fourteenth Amendment were findings that: (1) in numerous instances the Board changed attendance areas, changes having the net effect of increasing the percentage of blacks in schools that were already "black" and, correspondingly, increasing the percentage of whites in "white" schools, (*Id.* at 506-509); (2) the Board had consistently rejected proposals from its superintendent, citizens' committees, and other Board members that would result in significantly more racial integration, (*Id.* at 510); (3) the Board "used transportation provided at school district expense to make it possible for white children to avoid attending schools with greater percentages of black students enrolled than in the District as a whole", (*Id.* at 512); (4) very few black teachers were hired and most were assigned to schools with majority black enrollment (*Id.* at 513-516); (5) there was discrimination in the hiring and promotion of black administrators, (*Id.* at 516); (6) the Board placed transportable classrooms at black schools to accommodate over-enrollment at those schools while adjoining white schools had fewer transportables or none at all, (*Id.* at 518); and (7) the Board granted transfers "[which it] knew or should have known were wholly or at least in part motivated by racial considerations, including baseless trans-

[2]A majority of the Board voted not to appeal the District Court's original Decree. Thereafter a group of parents filed a motion in the District Court for leave to intervene as defendants for the purpose of perfecting an appeal. The motion was denied on March 4, 1970, and the movants appealed to this court. On June 15, 1970, the Court of Appeals affirmed, *Spangler* v. *Pasadena City Board of Education*, 427 F.2d 1352 (9th Cir. 1970).

fers that had the effect of intensifying racial segregation in the Pasadena schools", (*Id.* at 520). Additionally, the court found that during the 1969-70 school year, 85 percent of the District's black elementary school students attended the eight majority black elementary schools, while 93 percent of its white elementary students attended the remaining 21 elementary schools, (*Id.* at 507).

Pursuant to the court's Decree a comprehensive desegregation plan (commonly called the "Pasadena Plan") was formulated by a task force consisting of various employees of the District, under the direction of the Superintendent of Schools. The District, although relatively small geographically, includes the city of Pasadena, the city of Sierra Madre, the town of Altadena, and various portions of Los Angeles County. Under the Pasadena Plan, as approved by the District Court on March 10, 1970, the District was divided into four ethnically balanced areas. Students are assigned to the schools in the area of their residence "in such a way as to develop an ethnic balance in each school", while retaining at the elementary level the concept of the neighborhood school by permitting students to "walk to a nearby school for part of their elementary schooling and be transported as a neighborhood to another school" for the remainder. The plan created primary schools covering grades kindergarten through third (K-3) and elementary schools covering the fourth through sixth (4-6) grades to replace the old concept of the neighborhood school encompassing kindergarten through the sixth grade (K-6). The plan altered the secondary school structure by shifting the ninth grade from the junior high schools to the senior high schools. Ethnically balanced secondary school attendance zones were drawn in a fashion that prevented any secondary school from having a "majority of any minority students." The plan provided for transportation for all students who attend school outside their normal areas, and students were permitted to transfer from their assigned schools to other schools in cases of "urgent hardship" involving considerations of curriculum, family circumstances, or medical-psychological factors.

At the commencement of the 1970-71 school year the Pasadena Plan was implemented, and it has ostensibly remained in effect since that time. On January 15, 1974, the motion which is the subject of this appeal was filed by the Board, now having a majority of newly elected members. A hearing on the motion was conducted on February 25, 26, 27 and March 1, 1974. On May 15, 1974, the District Court entered its opinion and order denying appellants' motion in its entirety. The District Court refused the requested relief from its Order of January 23, 1970, in view of the opposition which the Pasadena Plan had encountered and the fact that beginning in 1971, only a few months after the supposed implementation of the original plan, the District had violated the "no majority of any minority" portion of the injunction. By the time of the hearing in March, 1974, five Pasadena schools were operating in violation of the no majority of any minority portion of the court's injunction.[3] *Spangler* v. *Pasadena City Board of Education,* 375 F.Supp. 1304, 1306 (C.D.Cal.1974). The court further found that the Pasadena Plan had not been accorded such cooperation from the Board as would permit an assessment of its educational success or failure. (*Id.* at 1308); that the decline in white enrollment relative to total enrollment in Pasadena

[3]As of the beginning of the 1973 school year, the Pasadena Unified School District operated 32 regular schools, having an enrollment of approximately 44 percent Anglo-Caucasians and 40 percent blacks. At the time of the initial implementation of the Pasadena Plan (1970-71) every school in the District was in literal compliance with the court's order. No school had a Negro enrollment as high as 50 percent, and in only three schools was the Negro enrollment greater than the Anglo-Caucasian enrollment. In the 1971-72 school year, one school (Loma Alta) slipped out of compliance with the no majority of any minority standard. In 1972-73 four schools, in violation of the court's order, had a black enrollment in excess of 50 percent, and in seven other schools the black enrollment exceeded that of Anglo-Caucasian students. By 1973-74, five schools were in violation of the court's order (Franklin, Sierra Mesa, Edison, Loma Alta, and Eliot), and sixteen others had a Negro enrollment exceeding that of Anglo-Caucasians.

Schools since 1970 was not caused by the desegration Order, since the decline closely approximated state-wide trends in California, (*Id.* at 1306); that the Alternative Plan was essentially a freedom of choice plan like those which had failed to desegregate Pasadena schools in the past, (*Id.* at 1311); and that it was unrealistic to believe that parents who fled the district because their children were forced to attend school with black children would now voluntarily choose that alternative under the Alternative Plan, (*Id.* at 1308).

SUMMARY OF ARGUMENT

Petitioners, in an untimely presentation, are asking this Court to review and invalidate the Decrees and Orders to Desegregate, which Judge Manuel Real, Central District Court of California, mandated in January and March of 1970, six years ago. Those Decrees and Orders were never appealed, at that time, for review. Yet, Petitioners, as an adjunct of a review of the Ninth Circuit Court of Appeals judgment of May 5, 1975, would seek a review of the validity and scope of those Decrees and Orders. This request is contrary to well established rules of this Court.

The Ninth Circuit Court of Appeals reviewed, narrowly, Judge Real's ruling on a four-part motion to dissolve an injunction, terminate jurisdiction over the Board and in the alternative, to allow modification of the Pasadena Plan. The Court of Appeals found that Judge Real had not erred in his findings, and was within the remedial and equitable discretions of his court. However, Petitioners, through a mischaracterization of the facts and findings, are alleging to the contrary.

There is the issue of Unitary status of the District, and whether or not the Board has complied with the mandates of the District Court. The evidence in the lower proceedings and the findings of the lower courts are clearly indicative that the Board *has not fully complied* with the Orders of the District Court. Without such compliance, the District cannot attain Unitary status and declare itself free of the vestiges of a dual school system and racial segregation. Such status can only be attained through findings of the court with jurisdiction over the Board. Judge Real has made no findings of this nature; to the contrary, he has found the Board in contempt of Court.

From the evidentiary findings of the lower courts, particularly the District Court, and the persistence of the Board in resisting the mandates of that court, there are serious questions of good faith. Without alleging bad faith on the part of the Board, the record is ample to indicate a lack of good faith. The tortious litigation which the Board has pursued, by means of its learned counsel, is indicative of more than seeking clarification through channels of appeal. Distortions of court opinions, constitutional standards and the facts in this matter are strongly indicative of deception, and a misuse of this Court and other courts for purposes of delay and frustration of the Pasadena Plan.

Amici have all lived closely with the developments of this litigation since 1968. All of the individuals and associations are desirous of a period of peace, cooperation and affirmative action in order to give the Pasadena Plan an opportunity to achieve its envisioned objective. The design of the Pasadena Plan was so comprehensive in scope and timetable that it could serve as a model for school districts everywhere. However, this success would require cooperative effort from all elements of the Pasadena community, and particularly the Board. That cooperation has been missing in past years.

Our students in Pasadena are the real objectives of this litigation and the Pasadena Plan. They are the beneficiaries, or victims, of whatever is resolved. Those students have expressed their confidence in the Pasadena Plan and their willingness to study under its provisions. This expression is indicated through a lack of disciplinary problems and conflicts within the student body. Also, those

students have affirmatively expressed themselves, in court, during the course of this litigation. Their voices have said:

> We think the Pasadena Plan will work, it is working and all of the students are benefiting from the experience—academically and culturally.

Let us listen to our children. They are ones for whom these battles are being fought. Everyone claims that they are seeking a quality educational experience for all students in public schools.

It is the position of Amici that such an experience exists in Pasadena under the Pasadena Plan. We ask the Court to allow our experiment to continue *for the betterment of all of us.*

ARGUMENT

I. Questions presented Nos. one (1), two (2) and (4), in the petition for a Writ of Certiorari, were not issues on appeal to the Court of Appeals for the Ninth Circuit and are therefore not properly before this Court.

Question Presented No. 1 Is a judicial decree valid which requires a fixed racial balance for all schools within a school system?

Question Presented No. 2 Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which the school system is in no way responsible?

Question Presented No. 4 Does a decree imposing racial balance preclude a school board from acting to prevent the school system from becoming an all-minority system?

It is a well settled rule, that issues which are neither raised before nor considered by the Court of Appeals will not ordinarily be considered by this Court. *Adickes* v. *S. H. Kress & Co.* (1970), 398 U.S. 144, *Lawn* v. *United States,* 355 U.S. 339, 362-363 (1958), *Husty* v. *United States,* 282

U.S. 694, 701-702 (1931), *Daigan* v. *United States,* 274 U.S. 195, 200 (1927).

The substance of the Questions presented deals with the validity of the Pasadena Plan, as approved by the District Court and the January 20, 1970 and March 10, 1970 Orders directing the implementation of the Pasadena Plan. Additionally, Question No. 4 raises an issue as to the limits of the Orders of the District Court as to any prohibitions on certain actions of the Petitioners. The Petitioners did not appeal the Orders of the District Court of January 20, 1970 and March 10, 1970 and no issues as to the validity of those Orders, or their scope, were raised during the proceedings which are subject to review before this Court.

In *Spangler* v. *Pasadena City Board of Education (74-2116),* 519 F.2d 430 (9th Cir. 5-5-75), Circuit Judge Ely stated at 431 *Ibid.*:

> It is important at the outset to understand the narrow ambit of our review, a constriction resulting from the procedural posture in which this appeal is before our court. *Neither the Pasadena Plan nor the District Court's January 23, 1970 and March 10, 1970, Orders directing the implementation of the plan are here on direct appeal.* (Emphasis added.) Nor are we concerned with the correctness of the District Court's original decision in *Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal. 1970), and the conclusions drawn therein. The only question before us now is whether the District Court erred in its determination, in denying appellants' 1974 motions, that events and circumstances occurring and existing in Pasadena since the Pasadena Plan was ordered implemented do not justify relief from the January 23, 1970, Decree, relinquishment of the court's continuing jurisdiction over the Board, or the substitution of a substantial alteration of the original Pasadena Plan.

Additionally, Circuit Judge Chambers (concurring opinion), *Id.* at 440, stated:

> Had the first Pasadena decree (Orders of January 23, 1970 and March 10, 1970) been appealed to conclusion . . . But the appeal was dropped. So the school board was left under a continuing duty to homogenize and they have not done it beyond the first massive reassignment of pupils.

Petitioners should not be granted the opportunity to raise the issues, as to the validity of the Orders of January 23, 1970 and March 10, 1970 or as to the scope of those Orders, before this Court for the first time.

The same reasoning should apply to the exclusion of petitioner's arguments as to mootness of the action (Brief 23). This issue is untimely, and the petitioners have never raised the issue, at any time, in any of the lower court proceedings.

II. The Pasadena Unified School District is not a Unitary System in that the Board has not fully complied with the Decrees and Orders of the District Court of January 23, 1970 and March 10, 1970 and therefore must continue under the jurisdiction of the Trial Court until such compliance occurs.

Petitioners argue that the District is and has been a unitary system since 1970. That conclusion follows from their reasoning that "the Pasadena Plan effected integration in one fell swoop" and "Since the institution of that plan, the Pasadena system is and has been one 'within which no person is . . . effectively excluded from any school because of race or color.' (Citations omitted)". Thus, the petitioners argue that by this standard the District became a unitary system at the time of the implementation of the Pasadena Plan and that it has maintained that status because of the aforementioned ongoing condition. It is the

position of amici that not only is the above erroneous and fallacious reasoning, but leads to an erroneous conclusion.

A. The Pasadena Unified School District is not and never has been a Unitary System, when measured by standards enunciated by this Court.

The petitioners have failed to acknowledge that the status of a unitary system is a matter of a finding of fact by the trial court, which has jurisdiction, and that finding of fact will occur after compliance with a well defined process. That process includes (1) the adoption of a constitutionally acceptable desegregation plan, (2) an evaluation of that plan in practice by the trial court to assess the effectiveness of the plan in the achievement of desired objectives, and (3) a finding by the trial court that state imposed segregation has been completely removed.

Step (2) of the above process requires an affirmative action on the part of the Board to assist in the evaluation and to accomplish the implementation. This process has been set forth in standards established by this Court to guide the lower courts in their jurisdiction and review of desegregation cases.

In *Green* v. *County School Bd. of New Kent Co., Va.*, 391 U.S. 430 (1968), this Court stated at 439:

> It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief.

This step is in the process towards status as a unitary system, according to the above standard, *has been* com-

pleted through compliance in the adoption of the Pasadena Plan by the District Court by Decree and an Order for Implementation on March 10, 1970.

However, the remaining two steps in the process towards status as a unitary system have never been completed because of lack of compliance by the Pasadena School Board. The standard for these two steps was enunciated in *Green, Id.* at 439.

> Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed. (Citation omitted).

Further, in *Raney* v. *Board of Education of Gould Sch. Dist.*, 391 U.S. 443 (1968), this Court stated at 449:

> We agree with the observation of another panel of judges of the Court of Appeals of the Eighth Circuit in another case that the district courts "should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) *that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved.*" (Emphasis added). *Kelly* v. *Altheimer*, 378 F.2d 483, 489 (1968). See also *Kemp* v. *Beasley*, 389 F.2d 178 (1969).

This Court has been quite definitive in these standards and guidelines to the district courts for the disestablishment of segregated school systems. Such a standard is not at issue here. What is at issue is whether the Pasadena School District has ever achieved the status of a unitary system according to those standards.

It is the position of the Amici that the District has not achieved the status of a Unitary System because of non-compliance with the Decrees and Orders of the District Court.

B. The Pasadena City Board of Education and the Pasadena Unified School District have not fully complied with the Decrees and Orders of the District Court.

In *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp., *supra*, District Judge Real rendered the following, as part of the Judgment in that case, at 505:

> The Court retains jurisdiction of this cause in order *to evaluate the plans and the execution of the plans* of the District in regard to the hiring, promotion, and assignment of teachers and professional staff members, the construction and location of facilities, and the assignment of students.

As to the assignment of students,[4] the District Court had further ordered, Id. at 505:

> . . . . that, by or before the beginning of the school year that commences in September of 1970 there shall be no school in the District, elementary or junior high or senior high school *with a majority of any minority students.* (Emphasis added).

The failure of the District to comply with the Decrees and Orders of the District Court[5],

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[4]Amicus would like to focus for the Court that the central thread throughout the *Spangler*, supra, proceedings has been the assignment of students. The District Courts' judgment and Order, above, envisioned the assignment of students as a central and major element in the effected remedy. The Pasadena Plan had as the major core of the plan, the redistricting of attendance zones and the assignment of students. The non-compliance of the Pasadena City Board of Education centered on the assignment of students in that the Board failed to evaluate the racial mix of the individual schools in view of reassignment, if necessary, of students in order to comply with the "no majority of any minority" decree. The Integrated Zone/Educational Alternatives Plan, A Proposed Modification to the Pasadena Plan, is a direct attack on the court approved and decreed assignment of students in that it would substitute "the neighborhood school policy" and the "freedom of choice" for school attendance within four ethnically balanced zones within the school district.

[5]The lack of good faith of the Pasadena Unified School District is primarily a result of the expressions made publicly and the contemptuous and indifferent administration of the District. See N. 7, at 29.

is evident from the following which were deemed as findings of fact in *Spangler* v. *Pasadena City Board of Education*, 375 F. Supp, *supra*.

at 1305:

> While no appeal was taken from that ruling (Order of Desegregation and Implementation of Pasadena Plan) (Editorial comment added), it was, to say the very least, not received with unanimous approbation.
>
> . . . . opposition to the Pasadena Plan came early. The Plan had not yet been approved when on March 2, 1970, a Motion for Leave to Intervene to oppose and appeal the judgment of this Court was filed, ...

at 1306:

> Only temporarily rebuffed, those who were determined that the Pasadena Plan would not succeed carried on their crusade. In April of 1970 (five months before the Pasadena Plan was to be implemented), a recall campaign against the three members of the Board who had voted against appeal of this Court's judgment was commenced. With the pledge to "STOP FORCED BUSING", Frank C. Crowhurst, Richard W. Millar, Jr., and Henry Marcheschi (past president of the Board of the District) unsuccessfully attempted to unseat . . . . (Editorial comment added)
>
> Implementation of the Pasadena Plan was accomplished with the commencement of the 1970-71 academic year in September of 1970. However, compliance was literal for only the first academic year; . . . . See n. 3, *supra*, at 9.

at 1308:

> Aside from the contrary evidence introduced by plaintiff-intervenor to show some education progress, it takes little educational expertise to recognize that the Pasadena Plan has not had the cooperation from the Board that permits a realistic measurement of its educational success or failure. No one can now estimate the possible results of the Pasadena Plan had it enjoyed the continued support of a Board who would act, as they profess, to 'do unto others as you would have them do unto you.' ***As such, the Board has not met its burden in any way sufficiently to have this Court rule upon this issue*** (educational value of Pasadena Plan and its educational success or failure) (Editorial comment and emphasis added)

at 1309:

> Modification of the injunction of this Court of January 23, 1970, would, in effect, leave the Board to its own devices concerning the Pasadena Plan and its continued viability as a mandate for desegregation. To grant such relief would—in light of the avowed aims of four members of a five-member Board—surely be to sign the death warrant of the Pasadena Plan and its objectives.

Circuit Judge Chambers, in the concurring opinion to the Ninth Circuit Court of Appeals review of *Spangler*, as cited above, found that because the Pasadena City Board of Education had failed to appeal the Order to Desegregate and implement the Pasadena Plan, the Board was under a continuing duty to homogenize the District, which they had not done after the first massive assignment in 1970. The Court of Appeals through their affirmation of the judgment of the District Court, has found that the Board was not in compliance with the Orders of the District Court. Circuit Judge Ely stated in *Spangler*, 519 F.2d 430, at 438:

> In light of the School District's *failure to comply* with the 'no majority of any minority' requirement for three successive years, and the fact that appellants sought to substitute a 'freedom of choice' type of plan that the court found would likely result in resegregation, it was reasonable for the District Court to conclude that all vestiges of de jure segregation had not been eliminated.

From the above, it is the position of the Amici that sufficient findings of facts have been established as to the failure of the Pasadena City Board of Education to comply with the Orders of the District Courts. On appeal and review to the Ninth Circuit, that Court has found the findings of the District Court reasonable, within the discretion of the court and not clear error.

Additionally, it is significant that the Board has been found in contempt of court for failing to carry out the provisions of the Pasadena Plan in the area of the selection of administrators. This Court recognized in *United States* v. *Montgomery County Board of Education* (1969), 395 U.S. 225, 231-2, that to achieve "a public school system wholly free from racial discrimination" desegregation of the staff is an important ingredient." The Pasadena Plan approved by the court on March 10, 1970, included specific provision for the hiring and promotion of administrative personnel and the Plan provided for a positive effort to be made to attract and recruit minority administrators to the District. The plan required that all applicants, who met the minimum eligibility requirements were to be admitted to an examination and that all appointments had to be approved by the Superintendent.

None of those procedures was followed by the Board. On July 10, 1973 (three years after the Order to Desegregate), the Board, on a 3-2 vote, appointed three new administrators. Two Acting Assistant Superintendents and an Acting Director of Elementary Curriculum were appointed without notice and without approval of the Superintendent; and all, predictably, were Caucasian. Thereafter, on July 31, 1973, with only Mr. Samuel Sheats objecting, the Board appointed two Caucasian principals; also, without following the recruitment procedures outlined by the Pasadena Plan. To the extent that they thought they were able, the present Board members continued in a way which

had brought about the institution of this case in August 1968. This matter of contempt is presently on appeal before the Ninth Circuit Court of Appeals (No. 74-2530).

Given the findings of failure to comply with the District Court's Orders and Decrees, it is evident that the Pasadena school system has not attained the status of a unitary system.

C. Since the Pasadena Unified School District has not fully complied with the Orders and Decrees of the District Court, and is therefore not a Unitary System, the District Court should retain jurisdiction until such compliance occurs.

The contention of petitioners that "population shifts that have caused minor variants in attendance ratios in Pasadena cannot be considered either to have been violations of the original decree or as destroying the unitary nature of the system created in 1970" (Brief 18 para. 2), is an erroneous assessment of the non-compliance, as outlined above. As this Court stated in *Green, supra,* 391 U.S. at 437-438 there is an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." (Citations omitted.) It is this affirmative duty and burden which the Pasadena City Board of Education has failed to satisfy. Implementation of the Pasadena Plan was the beginning of a process to dismantle the dual school system in Pasadena. Without an ongoing evaluation by the District Court as to the effectiveness of the Pasadena Plan to accomplish its objective, it could not by its initial implementation meet the standard of affirmative duty in *Green*. The petitioners fail to address the fact that their failure to take affirmative actions after the implementation of the Plan appears to be the main cause of the trend of the District back towards resegregation. It is that failure to which the District Court has addressed itself, and the Court of Appeals affirmed on appeal and review.

Without such affirmative duty and compliance, the mandate of this Court in *Green* and *Raney, supra,* must apply that the District Court should retain jurisdiction until it is *clear* that state-imposed segregation has been completely removed.

Also, in *Green, supra,* this Court found that District Courts have not merely the power, but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future.*

To the end of barring like discrimination in the future, the District Court must maintain jurisdiction so that the operation of the desegregation plan will indicate what future effects will occur with continued operation of that plan. Any modifications to the original decree must come after a reasonable period of observation and evaluation.

That is not the situation in this case before the court. Very little affirmative action has occurred so that the District Court could properly evaluate the effects of the Plan. On the contrary, Judge Real of the District Court found evidences of obstruction and counterproductive efforts on the part of the Board. The efforts of that Board to implement the "freedom of choice" plan as a modification when all reasonable efforts had not been made to insure the total implementation of the Pasadena Plan, is an example of such counterproductive efforts.

Given the findings of the lower courts and the standards of this Court, for conversion to unitary systems, the Court should find that both the District Court and the Court of Appeals properly denied the motion for the dissolution of the District Court's injunction and for the termination of the District Court's continuing supervision over the actions of the Board.

III. In the event this Court finds that the issues of the validity and scope of the District Court Orders and Decrees of January 23, 1970 and March 10, 1970 are properly before this Court, then the "No Majority of Any Minority" and "Annual Reassignment of Students, if necessary" requirements, are not rigid mandates for racial balance but rather are valid elements of the Orders and Decrees.

Petitioners contend that this Court, since 1970, has made it abundantly clear that racial balance is not a proper formula for a desegregation decree. (Brief 13, para. 2.) To support that contention, the petitioners cite language from *Swann* v. *Board of Education* (1971), 402 U.S. 1, 24, 31-32. It is the position of Amicus that the petitioners have cited the rulings of *Swann, supra,* in part, out of context and without their proper and total interpretation.

In *Swann, Id.,* at 25, this Court ruled that a very limited mathematical ratio was within the equitable use made of remedial discretion of the District Court. The court found that the District Court's finding of substantial history of dual school and recalcitrance on the part of the School Board in the establishment of a desegregation plan, made the use of mathematical ratios no more than a starting point in the process of shaping a remedy, rather than a rigid and inflexible requirement of racial balance or mixing. It is important to note that in *Swann,* the above ruling was based on the finding of facts which satisfied two criteria (1) a substantial history of dual schools, and (2) recalcitrance and reluctance on the part of the School Board.

Those criteria are satisfied by the facts in *Spangler.* The District Court has made extensive findings of a substantial history of dual schools and policies of the Board which reinforced and continued that dual system.

Additionally, the majority of the Board which approved the Pasadena Plan were constantly under attack from 1970 until 1973 when they were replaced for the most part. An atmosphere of political hysteria, political attack and po-

litical obstruction was conducted by a credible segment of the Pasadena community to prevent implementation of the Pasadena Plan from the time of its design and conception, and prior to implementation, which continues until this day. Some of those persons, including Mr. Marcheschi, a past president of the Board, were a controlling majority of that Board and they have been since March 1973. Their avowed political aim has been to dismantle the assignment of students and to return to the neighborhood school system and freedom of choice, which had previously failed for a decade to effect desegregation of the Pasadena schools.

With those facts in the *Spangler case,* the similarity to *Swann* is sufficient to justify the District Court's use of the "no majority of any minority" ratio to serve as a starting point in the process of shaping a remedy. That Court's continued insistence upon the ratio should be viewed as a continuing effort to offset the recalcitrance, resistance and reluctance of the Pasadena City Board of Education.

It is the opinion of Amici, that the "no majority of any minority" ratio of *Spangler* is not inconsistent with the ruling of this Court in *Swann.*

As to the annual reassignment of students, the language of *Swann* is not inconsistent with that requirement of the District Court. The Court ruled, 402 U.S., *supra,* at 32 that school authorities nor district courts were required to make annual adjustments of the racial composition of student bodies *once the affirmative duty to desegregate has been accomplished* and racial discrimination through official action has been eliminated from the system. It has been adequately found by the District Court, and affirmed by the Court of Appeals that such is not the situation in this case. The District is not in compliance with the Orders and Decrees of the District Court and the District has not yet achieved unitary status. Therefore, the affirmative duty to desegregate *has not yet been accomplished,* and the above ruling of *Swann* would be inapplicable to this case.

The above requirements are still within the remedial and discretionary powers of the District Court.

IV. The District Court's rejection of the "Freedom of Choice" Neighborhood School Plan was based on sufficient findings and was within the remedial discretion of that Court.

The District Court found the "freedom of choice" alternative plan to the Pasadena Plan inadequate for the following reasons (1) that it was unreasonable conjecture to presume that white parents and students who have moved out of the Pasadena Unified School District during the implementation of the Pasadena Plan would now voluntarily return under the Alternative Plan to attend desegregated schools, (2) that the Board failed to prove any connection between the Pasadena Plan and the "white flight" from the district, (3) that the educational opportunities presented by the Alternative Plan were not proven by the evidence presented to be equal to, or superior to, those educational opportunities under the Pasadena Plan, (4) that the Board failed to prove that the Pasadena Plan was not succeeding educationally, but, to the contrary plaintiff-intervenor (United States) introduced evidence to prove some educational progress, and (5) that there was no fiscal advantage to the Alternative Plan in that it would require as much busing or more than the Pasadena Plan.[6]

The Court of Appeals reaffirmed those findings in holding that the District Court did not abuse its discretion in justifiably finding the Alternative Plan as unlikely to achieve the constitutionally required Unitary School system in Pasadena.

This Court held in *Green, supra,* at 439:

> The obligation of the District Courts, as it always has been, is to assess the effectiveness of a proposed plan in

[6]See Prof. I. Goodman's extensive analysis of neighborhood schools, freedom of choice, residential segregation and state action. 60 Cal L R, Vol. 275 (March 1972), 298 et seq.

achieving desegregation. There is no universal answer to the complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. .... It is incumbent upon the district court to weigh ..... in light of any alternatives which may be shown as feasible and more promising in their effectiveness .....

It is the position of Amici that the findings of the District Court, as affirmed, were within the discretion of that Court within the rule set forth in *Green, supra*. The District Court assessed the Alternative plan and found it less sufficient, as an alternative to the Pasadena Plan.

Petitioners contend that the Alternative Plan was rejected as a modification to the Pasadena Plan, because (1) the proposed amended plan would not maintain the racial balance quotas, and (2) the proposed plan involved freedom of choice, and was therefore, inadequate. (Brief 21 para 1, 22 para 1). In support of their contentions, petitioners argue that the ruling of this Court in *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972) was "that the absence of racial balance was not a bar to the validity of an amended desegregation plan. (Brief 21).

The facts in *Wright, supra*, were that of a city, which had shared-cost with the county to use the county public school system. That share-cost arrangement predated the change of the status from a town to a city, which status as a city authorized, under state law, the provision of its own public school system. Subsequent to an Order to Desegregate the county public school system, the city sought to form its own school system.

This Court in viewing racial imbalance alone, as not sufficient reason to disallow the city's plan, pointed out that there were other circumstances to consider, to wit: that the city plan would nucleate segregation, as to races, between the county public school system and that of the city. As

such it was a plan to resegregate, or to enhance segregation, not a plan to desegregate.

Also, in this case before the Court, there are other circumstances. The District Court found that the Alternative Plan would increase the number of schools in default as to the "no majority of any minority" requirement immediately from five (5) to a substantial number of schools as a direct result of implementation of that plan. It was not foreseeable what additional effect would be produced in future years. Therefore, the District Court found the Alternative Plan as a plan to resegregate, or to enhance segregation.

As in *Wright, supra*, the plan was rejected. It is the position of the Amici, that the facts and rulings of *Wright, supra*, support the rejection of the Alternative Plan.

To support the contentions as to the "freedom of choice" in the Alternative Plan, the petitioners argue that *Green, supra*, does not outlaw "freedom of choice" elements. That argument is an accurate interpretation of *Green, supra*, in that this Court did not rule that "freedom of choice" can have no place in desegregation plans or was unconstitutional. However, when viewed in its broadest meaning, this Court did hold that when speedier and more effective means of conversion to a unitary, non-racial system are available, *"freedom of choice must be held unacceptable."* In this case before the Court, the Pasadena Plan has been adjudged and approved by the District Court as speedier and more effective than the prior "freedom of choice" plan which was operated by Pasadena for a decade before 1970.

During the period when the prior "freedom of choice" plan was in operation, no meaningful changes occurred in the segregation pattern of the Pasadena school system. The only changes of any merit, were a slight increase in the number of Black students in previously all-white or predominately white schools. Because of this prior experience with a "freedom of choice" plan, the District Court made

findings of de jure segregation and ordered the dismantling of the dual school system in Pasadena.

It is the position of Amici that the arguments and contentions of Petitioners, as to the reasons for the District Court to reject the Alternative Plan, are erroneous.

The total effect of the Alternative Plan would be to subdivide the District into four zones, which represent the racial composition of the district, and to allow the "freedom of choice" only within those zones. The District would be returning to the segregation patterns prior to 1970 in that four mini-districts would be created, in mirror image of the District. If "freedom of choice" could not desegregate the schools within the District prior to 1970, the "freedom of choice" in the mini-district could not effectuate desegregation.

V. There is a question as to the good faith of the present Pasadena City Board of Education.

There is ample evidence and findings in the proceedings of the lower courts to lead this Court to seriously question the good faith of the Board. As outlined above, the District Court through numerous findings has ruled that the Board has not met its burden in any way sufficient. That burden as enunciated in *Green, supra,* is an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination is eliminated root and branch. Instead, of that affirmative duty, one of the issues before this Court, the "freedom of choice" Alternative Plan represents a neutral position of the Board in that the burden and duty would be transferred to the parents and students, at a time when the decision of *Brown I* and *Brown II,* and subsequent decisions to date, place that *burden squarely* on the Board.

Additionally, the record, in the lower court proceedings, indicate numerous instances of questionable or negative actions by the Board. In Plaintiffs-Appellees' Brief to the

United States Court of Appeals for the Ninth Circuit, pages 6-10,[7] are cited many of these instances of questionable or

[7]Following the judgment requiring Pasadena schools to desegregate, the majority of the then Board voted not to appeal it. (Exh. I.) In retaliation, the present president of the Board sought to recall those members of the Board who had voted not to appeal, and to be elected to the Board himself. (Exhs. II-VI.) Mr. Marcheschi and his two running mates made clear they were running on a platform of resistance to the district court's order which had enjoined the Board and its members "from discriminating on the basis of race in the operation of the Pasadena Unified School District." (CT 1.) It is this which the Board and its members resisted in their arduous defense of the case. And it was the reversal of this constitutional imperative that the recallers sought to achieve. In their efforts, the recallers, the present president included, made clear their view that mandatory pupil assignments to achieve the Constitution's goal were not to be countenanced. Thus Mr. Marcheschi told the voters, "Involuntary integration is self-defeating. It will not work!" (Exh. VI, p. 2) and he promised that "neighborhood schools will be restored in the Pasadena School District hopefully by January, 1971, certainly by September, 1971." (Exh. V, p. 2), and that "children will go to school where they live—in their neighborhood schools" (*ibid.*); that "minority children will be encouraged and assisted to attend schools outside their neighborhood IF THEY VOLUNTARILY DECIDE TO DO SO" (*ibid.*). Thus evidencing a clear intent that there be *no* desegregation in Pasadena. Missing from the appeal to the voters was the suggestion that white students would be encouraged to attend schools outside their neighborhood. And the slogan "Stop Forced Busing" was a hallmark of the campaign. (Exh. III, pp. 1, 2.) It will be remembered that the trial court had found the Board to have used the neighborhood school policy and policy against forced busing, plus an open enrollment or free-choice plan, and that those policies result in segregation and in increasing segregation.

While Mr. Marcheschi failed in his efforts in 1971 to recall the members of the Board and to be elected himself, he was elected to the Board at the next regular election, and from that post he continued his efforts. He presented, on November 9, 1971, "The New Pasadena Plan" (Exh. VII), the principal feature of which was a system of "free choice" for the parents of Black children as to whether the children wanted to "attend integrated schools in the White community or majority Black schools located in the Black community." (Exh. VIII, p. 4.) To make attendance in the Black community more attractive, the caveat was appended that those schools would be "under Black control." The Board as then constituted, seeking to comply with the court's order, refused. (Exh. IX.)

The next election, March 6, 1973, saw a slate of candidates running on the same platform as Mr. Marcheschi's in 1970. These persons, Richard Vetterli, Henry Myers, Jr. and Lyman Newton, ran

on a platform which included "stop forced busing of students and return them to neighborhood schools." (Exh. XIII, p. 1; see also Exhs. XII, XIV, XVI.) And Mr. Marcheschi supported them. In a Vote-O-Gram to the voters, he said: "Must elect Vetterli, Myers and Newton to join me on school board. Essential we re-establish neighborhood schools . . . ." (Exh. XVII.) The Campaign literature on behalf of Mr. Newton stated: " 'He and his wife have three children . . . Only Lori attends a public school in the Pasadena School District. The other two children attended public schools until the busing issue forced them out of their neighborhood,' said Newton." (Exh. XIII, p. 2.) *Cf. Cook* v. *Hudson*, 365 F.Supp. 855 (W.D. Miss. 1973).

That slate won, leaving the present board composed of four persons opposed to positive integration, in favor of "free choice," and one, Sam Sheets, supporting the Court's order. (CT 420.)

Virtually immediately upon taking office, the three new members reorganized the administrative set-up of the District. It will be remembered that among the discriminations practiced by the former members of the Board was discrimination in hiring and promoting administrative personnel. To remedy that situation, the Court's order required the plan to "include programs for the assignment, hiring, and promotion of . . . professional staff members in such a manner as to reduce racial segregation throughout the District." (CT 1.) This was, of course, an appropriate order. The Supreme Court has recognized that to achieve "a public school system wholly free from racial discrimination," desegregation of the staff is an important ingredient. (*United States* v. *Montgomery Co. Bd. of Educ.* [1969], 395 U.S. 225, 231-32, 23 L.Ed.2d 263, 89 S.Ct. 1670.)

To this end the Pasadena Plan approved by the Court on March 9, 1970, included specific provision for the hiring and promotion of administrative personnel. Under the heading "Recruitment and Selection of Administrators," pp. 46-47 of the Plan (Exh. A), the Plan provides for a positive effort to be made to attract and recruit minority administrators to the District. Extensive advertising of available positions was to be engaged in, including sending announcements to the college and university placement offices in Southern California, and also, to a mailing list recommended by the Department of Intergroup Education, which includes agencies and districts where minority personnel may be available. The plan required that all applicants who meet the minimum eligibility requirements were to be admitted to the examination and that all appointments had to be approved by the Superintendent. The plan took pains to make clear its intent that mere passive conduct in the search for minority personnel was not to be tolerated. Thus:

> A positive recruitment program paralleling the teacher recruitment program will actively seek out minority group administrators, supervisors, and counselors who are interested in employment with the Pasadena Unified School District. As a part of this recruitment program, bulletins concerning job opportunities will be sent to college and university placement offices and

> other professional organization offices. In these bulletins, minority candidates will be especially encouraged to apply. (*Ibid.*)

None of the procedures was followed in the July 10, 1973 appointments by the Board, on a 3-2 vote, of three new administrators. Two Acting Assistant Superintendents and an Acting Director of Elementary Curriculum were appointed without notice and without approval of the Superintendent; and all, predictably, were Caucasian. (Exh. XX, p. 3; RT 392.)

In addition, the Board thereafter, on July 31, 1973, with only Mr. Sheets objecting, appointed two Caucasian principals—also without following the recruitment procedures outlined by the Pasadena Plan. (Exh. XXI; RT 394.)

In sum, to the extent they thought they were able, the present Board members continued in the ways which brought about this case in the first place.

Another significant occurrence is that which occurred when Temple City, an all-white community and part of the Pasadena District, sought to withdraw from the District when faced with the prospect that the children would be required to go to school with Black children. Although Mr. Marcheschi speaks of "white flight" and how he wants to stop it and thus stabilize the community (*e.g.*, Exh. VIII, p. 2), he nevertheless voted to permit this entire block of white children to leave the district. (RT 153; Exh. 4, p. 17883.) This was white flight with a vengeance. Mr. Marcheschi's explanation is that it was a vote for the principle of "free choice." (RT 153.) This hardly was an exhibition of good faith. It is no wonder the trial court felt it could not relinquish jurisdiction. It could hardly have done otherwise.

By their conduct, Petitioners scarcely command the confidence which is for reasonable assurance that the old ways will not be returned to. For it is to be remembered that "the [14th] Amendment nullifies sophisticated as well as simple modes of discrimination." (*Lane* v. *Wilson* [1939], 307 U.S. 268, 275, 83 L.Ed. 1281, 59 S.Ct. 872.) And where "there has been discrimination, whether accomplished ingeniously or ingenuously, [it] cannot stand." (*Smith* v. *Texas* [1940], 311 U.S. 128, 132, 85 L.Ed. 84, 51 S.Ct. 164.) It was not what defendants call "minor racial imbalances" (Brief 23) which compelled the district court to deny relief. It was the fact that defendants have not made the school district unitary, have not sought, really, to effect desegregation, but, rather, tried every which way to avoid it, that so compelled the trial court.

Cf. The attitude of the present Board—to encourage students to attend various schools because they are "better" (Exh. L, p. 1)—with that of the Board in 1970 when it determined to comply with the district court's order: "We have proven that a major desegregation plan can be implemented smoothly in an urban area. Never again will any parent in the Pasadena Unified School District be able to legitimately say 'I want my youngster to attend this school rather than that one because his chances of receiving a good education are better!' " (Exh. 18.)

negative conduct and actions; particularly by Mr. Marcheschi, the president of the Board until July 1975.

It is difficult to reconcile the erroneous contentions and arguments of petitioners with affirmative duty and good faith. Throughout these proceedings, the petitioners have consistently found positions which are not in conformance with the Decrees and Orders of the District Court. That is not to say that legal redress excludes disagreement with the District Court. However, the same zealous energies applied to affirmative action to make the Pasadena Plan a working reality, would have made all of the lower court proceedings unnecessary.

VI. Amici Curiae are residents within the Pasadena Unified School District and/or interested parties, all of whom are dedicated to the preservation of the Pasadena Plan and the reality of a totally integrated school system.

Amici curiae are all associations of individuals, who have been intimately involved in the matter of the Pasadena School System since the institution of this action in March of 1968, nearly eight years ago. Since that time, amici have followed the various litigation, political activity and community interaction relative to the desegregation of the Pasadena schools.

It has not been an easy or comfortable eight years for ourselves, friends and loved ones, who as parents, students or community folk, have lived with the emotional trauma that has been caused by the implementation of the Pasadena Plan. It should be sufficient to say that mostly all of that emotional trauma has been instigated by those elements in Pasadena, who were determined that the Pasadena Plan and the attendant assignment of students would not work or continue. Those elements, through the press, public meetings, political activity and other means has attempted to maintain a level of hysteria in the minds of those who would be most effected by the Pasadena Plan.

However, those persons most directly effected by the Pasadena Plan, the students, have demonstrated that the plan is not only working to broaden their educational and cultural experiences, but those students have consistently supported the continuation of the Pasadena Plan in their community. It appears to be the adult community within Pasadena which continues in an attempt to maintain ardent opposition to the Pasadena Plan. The plan is working for the student population. As Judge Real of the District Court evidenced through a finding of fact, there are few disciplinary problems resulting from the implementation of the plan. Also, there were few administrative problems which were directly attributable to the Pasadena Plan. Most of the problems were attributable to opposition to the plan.

Individual students, who are connected with students' organizations at schools in the District, have expressed an interest in joining the Amici Curiae in this brief. Only last minute legal and administrative questions (legal standing, process for adoption of binding resolutions, etc.) prevent that joining as the deadline for publication of this brief approached. Some of those individuals represented students at the senior high schools in Pasadena, and ones who have probably been most acutely aware of the conflicts within the community within the last six years.

Additionally, during the proceedings in District Court, the subject matter of which is before this Court on Appeal—the motion—more than 2,000 students presented petitions to the Court which expressed their strong desires to continue to live and study under the Pasadena Plan.

The students have indicated through their behavior and performance, during the past six years, that the Pasadena Plan is a workable plan—culturally, educationally and as an desirable and important intergroup/intercultural catalyst. The students, and equal and quality education, have been the concern of this Court, after all, since *Brown I* and *Brown II* more than twenty years ago. Those beneficiaries

have spoken, and their choice has been the maintenance of the Pasadena Plan as the tool for desegregation of the school system.

All of AMICI are dedicated to the furtherance of civil rights, human dignity and the professional excellence of our society, as well as the Pasadena schools. We have all struggled together, and hard, to make the Pasadena Plan a reality. We foresee that it will be in the opinion of this Court that those labors were for a valid cause.

CONCLUSION

The judgment of the lower courts should be affirmed, and the writ of certiorari to the Ninth Circuit should be dismissed, as improvidently granted. In the alternative, the judgment of the lower courts should be affirmed through a determination of the issues on their merit and the findings of this Court.

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